

# Sex Offender Registration in Indian Country

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## I. INTRODUCTION

Sex offenses against women and children may be a more serious problem in American Indian and Alaska Native communities than any other communities in the United States. While, on average, a woman in the United States faces a one in five chance of being raped in her lifetime,<sup>1</sup> the statistics for American Indian and Alaska Native women are far graver: they have a one in *three* chance of being raped during their lifetimes.<sup>2</sup> Amnesty International recently examined the high rates of sexual assault against Native American women and accused the United States of failing to meet its international human rights obligations to women and indigenous peoples.<sup>3</sup> Data on the incidence of child sexual abuse is equally troublesome. According to federal health statistics, one in every four Native girls and one in every seven Native boys will be sexually abused.<sup>4</sup>

Given the foregoing, it should be no surprise that Congress first addressed the idea of sex offender registration in a law directed at Indian reservations. In 1987, a teacher at a federal Bureau of Indian Affairs school on the Hopi reservation was arrested for the sexual abuse of as many as 142 boys between 1979 and 1987.<sup>5</sup> The teacher, John W. Boone, was prosecuted and convicted, and the federal government settled a civil action with some of the victims for nearly \$50 million. In response to the wide public outcry following the Boone case, Congress enacted the Indian Child Protection and Family Violence Prevention Act in 1990 [ICPA].<sup>6</sup> Unfortunately, the ICPA was a very modest effort, and Congress ultimately failed to appropriate any significant funding to implement the law. Though it failed to

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<sup>1</sup> PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE UNITED STATES (Amnesty Int' Publications 2007).

<sup>4</sup> Dep't of Health and Human Services, Indian Health Service Child Abuse Project, available at <http://www.ovccap.ihs.gov/> (last visited Nov. 16, 2008).

<sup>5</sup> Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, AMNESTY MAG. (2007), available at <http://www.amnestyusa.org/amnestynow/soulwound.html>.

<sup>6</sup> 25 U.S.C. § 3201(a) (2000).

produce a sex offender registry, it was a starting point for congressional initiatives involving sex offender registration, signaling the dawn of a new era in federal criminal justice policy.

Widespread sexual abuse is only one of the many serious public safety challenges besetting Indian reservations, a situation exacerbated by enduring difficulties facing criminal justice on Indian reservations.<sup>7</sup> The rules of jurisdiction, which have been pieced together and fashioned in more than two hundred years of federal legislation and Supreme Court decisions, have created what has famously been called a “jurisdictional maze.”<sup>8</sup> There are currently two general models for addressing crime on reservations. One prevailing model of jurisdiction, the Public Law 280 model, locates the responsibilities for law enforcement and criminal justice with state authorities.<sup>9</sup> Another, the Indian Country model, locates the responsibilities primarily with the federal government, with tribal governments working in a limited supporting role.<sup>10</sup> A good deal of anecdotal evidence suggests that neither of these models work well, and studies are underway to provide a clearer, more comprehensive, and more empirical understanding of the situation.<sup>11</sup>

One source of the problems with the existing models is that important public responsibilities on Indian reservations, such as law enforcement, public safety, and criminal justice, are assigned to governmental actors who are institutionally incompetent to meet these substantial responsibilities. Many of the key actors are unaccountable to the communities for whom they ostensibly work. Others are simply unfamiliar with the legal, cultural, and geographic terrain.

Congress inadvertently wandered into this “jurisdictional maze” or “maze of injustice”<sup>12</sup> when it enacted the Sex Offender Registration and Notification Act [SORNA] as Title I of the Adam Walsh Child Protection and Safety Act.<sup>13</sup> Despite

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<sup>7</sup> See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

<sup>8</sup> See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 508–13 (1976).

<sup>9</sup> See generally CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian County*, 44 UCLA L. REV. 1405, 1415–19 (1997) (discussing the effects of Public Law 280); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

<sup>10</sup> See generally Clinton, *supra* note 8; Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975).

<sup>11</sup> The authors have been involved in the implementation of a \$1.46 million federal grant from the National Institute of Justice to study the Administration of Criminal Justice in Indian Country (Principal Investigators: Duane Champagne, Carole Goldberg and Kevin Washburn; Virginia Davis has consulted on the work).

<sup>12</sup> See MAZE OF INJUSTICE, *supra* note 3.

<sup>13</sup> 42 U.S.C. § 16901 (2006).

the growing realization of the specific structural problems at play on Indian reservations, Congress failed to heed the unique jurisdictional arrangements on Indian reservations and otherwise ignored the special circumstances existing there. SORNA further complicated the complex jurisdictional regime on Indian lands and may also have caused unnecessary collateral damage to tribal governmental interests. Moreover, SORNA faces many obstacles to its own effectiveness on Indian reservations, owing primarily from its content and design.

This article critiques SORNA and places it in the context of the broader scheme of public safety and criminal jurisdiction on Indian reservations. Part I briefly explains the jurisdictional background of criminal law and regulatory authority on Indian lands. Part II discusses the particular development of federal and tribal sex offender registration and notification laws. Part III explains how SORNA engages Indian tribes and other registration jurisdictions as a prelude to discussion of the obstacles of effective implementation on Indian lands. Part IV offers some criticisms of SORNA for further fragmenting regulatory and criminal jurisdictional authority on Indian lands, destabilizing existing law enforcement arrangements, and ignoring recent federal standards of good government in the federal Indian policy arena. Part V explains some of the other practical problems that may arise under this hastily enacted law. The conclusion urges Congress to reconsider SORNA and to adopt a more deliberative approach to these very serious issues.

## II. OVERVIEW OF THE JURISDICTIONAL MAZE ON INDIAN LANDS

Criminal jurisdiction on American Indian reservations involves a tangled web of statutes, treaties, executive orders, and court decisions, creating overlapping authority and, occasionally, gaps in jurisdiction. Authority is divided among federal, tribal, and state governments, depending in part on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim.<sup>14</sup>

For most of American history, criminal jurisdiction on Indian reservations was primarily a tribal or federal matter. Traditionally, state criminal authority was thus limited on Indian reservations. To a large degree, reservations were conceived as sanctuaries from state laws.<sup>15</sup> Federal common law has, however, complicated the jurisdictional structure. In *United States v. McBratney*,<sup>16</sup> for example, the Supreme Court held that states have jurisdiction to prosecute offenses on Indian reservations that are entirely between non-Indians. Presumably, the federal and tribal interest in such matters is minimal. *McBratney* had the effect of

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<sup>14</sup> See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 729-71 (Nell Newton et al. eds., 2005).

<sup>15</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding that the Cherokee Nation was a place where the laws of Georgia could have no effect); see also *United States v. Kagama*, 118 U.S. 375, 384 (1886) (stating that citizens of states are the Indians' most deadly enemies).

<sup>16</sup> 104 U.S. 621 (1882).

making racial status, or perhaps more specifically tribal political status, a key jurisdictional fact. Much later, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court added a book end to the *McBratney* line of cases, holding that tribes lack jurisdiction over non-Indians on reservations.<sup>17</sup> Thus, each realm of jurisdiction is exclusive.

As a result of these cases, the tribal or non-tribal status of a defendant is key in determining which government—state, tribal, or federal—has jurisdiction to prosecute.<sup>18</sup> If an offense involves an Indian as a victim or defendant, it is a federal or tribal matter. Many large jurisdictions, including Arizona, Montana, New Mexico, and South Dakota, still operate this way today. In these “Indian country jurisdictions,” states have no jurisdiction over Indians, or crimes involving Indians, on Indian lands.

In 1953, Congress added a wrinkle that complicated the scheme in some states. In an experimental effort to reduce the federal responsibility over criminal justice, Congress enacted a statute commonly known as Public Law 280, in which it delegated criminal jurisdiction and limited civil jurisdiction on Indian reservations to six states, California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska, with some exceptions for individual tribes.<sup>19</sup> These states are commonly referred to as “mandatory PL 280 jurisdictions.” Public Law 280 allowed other states to “opt in” to the same regime, and several additional states accepted jurisdiction over Indian reservations in whole or in part. These states are collectively known as “optional PL 280 jurisdictions.”<sup>20</sup> Taken together, the jurisdictions in which Public Law 280 applies either as a federal mandate or by the “opt in” approach are called Public Law 280 jurisdictions.

Public Law 280 was a limited experiment. Its expansion was dramatically curtailed in 1968, when Congress gave tribes a veto over future state efforts to opt in. Though Public Law 280 is still in effect, and it continues to allow the existing jurisdictions to exercise authority over offenses, there is some evidence that Public Law 280 was a failed experiment.<sup>21</sup> Indeed, several states have “retroceded” authority back to the federal government.

Thus, there are two prevailing models of criminal justice authority on Indian reservations, the “Public Law 280 model” and the “traditional Indian country model.” Understanding these two models is important in the context of sex

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<sup>17</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

<sup>18</sup> *See United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001).

<sup>19</sup> 18 U.S.C. § 1162 (2006).

<sup>20</sup> Additional states (AZ, FL, ID, IA, MT, NV, ND, UT, and WA) voluntarily assumed all or part of the jurisdiction offered. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 14, at 573–81.

<sup>21</sup> Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006). Indeed, several states have retroceded criminal jurisdiction back to the federal government. *Id.* at 725–26.

offender registration because, as will be discussed in Part II, SORNA distinguishes between tribes on this basis.

Of course, a sex offender registration regime also implicates regulatory concerns. It is not a crime to be a sex offender who has already served his time. The regime is designed to regulate the activities of such persons on the theory that they are still dangerous. Under Public Law 280 and other long-standing principles of federal law, the *regulatory* regime on Indian lands has long been simpler than the criminal regime, at least in some ways. While Public Law 280 gave some states criminal authority on Indian reservations,<sup>22</sup> no states have general regulatory authority over Indians on Indian reservations.<sup>23</sup> Thus, prior to SORNA, there was no basis for a state to impose or enforce a sex offender regulatory regime on Indian lands.

### III. HISTORY OF FEDERAL AND TRIBAL SEX OFFENDER MANAGEMENT ON INDIAN RESERVATIONS

As with the history of the United States itself, the history of federal sex offender registration begins with American Indians. In 1990 Congress first addressed the subject of a centralized national registry to track child sexual abuse offenders on Indian lands. Here, as in most cases involving sexual abuse legislation, Congress was reactive rather than proactive. When school teacher John W. Boone startled the national conscience by abusing as many as 142 boys in a Bureau of Indian Affairs school during a six-year period ending with his arrest in 1987, Congress reacted cautiously and deliberately.

#### *A. The Indian Child Protection Act of 1990*

In response to this notorious instance of sexual abuse in reservation schools, Congress enacted the Indian Child Protection and Family Violence Prevention Act in 1990 [ICPA].<sup>24</sup> The ICPA acknowledged that “multiple incidents of sexual abuse of children on Indian reservations have been perpetrated by persons employed or funded by the Federal Government,”<sup>25</sup> and it sought to address the problem in several ways. First, it established mandatory reporting requirements by doctors, teachers, social workers, psychiatrists, and law enforcements officials who learn of child abuse.<sup>26</sup> Second, it required background checks, called “character investigations,” of those federal employees who have regular contact with Indian

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<sup>22</sup> 18 U.S.C. § 1162 (2006).

<sup>23</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

<sup>24</sup> 25 U.S.C. § 3201(a) (2000).

<sup>25</sup> 25 U.S.C. § 3201(a)(1)(C) (2000).

<sup>26</sup> 25 U.S.C. § 3202 (2000).

children.<sup>27</sup> Finally, the law directed the Secretary of the Interior to work with the Attorney General and the Secretary of Health and Human Services to study the feasibility of establishing a central registry for sex offenders.<sup>28</sup> No central registry, however, was ever implemented, and there seems to be some doubt as to whether the feasibility study was ever completed.<sup>29</sup>

Not long thereafter, sex offender registration gained congressional salience in a much broader context. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("Jacob Wetterling Act"),<sup>30</sup> which required all states to implement a sex offender registration program or forfeit ten percent of their federal law enforcement funding.<sup>31</sup> The Jacob Wetterling Act required convicted sex offenders to register their addresses with law enforcement and permitted states to establish community notification programs.

Prior to the Jacob Wetterling Act, only a few states tracked convicted sex offenders in any meaningful way.<sup>32</sup> In 1996, the Jacob Wetterling Act was amended, in what was known as "Megan's Law," to require states to develop a program to notify the community about registered sex offenders.<sup>33</sup> The states were given broad discretion as to how to conduct these community notification programs. By 2000, all fifty states and the District of Columbia had sex offender registration systems and community notification programs, though the details varied greatly by state. Although the ICPA had been Congress's introduction to the issue of sex offender registration, institutional memory in Congress can be weak; Congress neglected to address Indian tribes in any way in the Jacob Wetterling Act or Megan's Law.

### B. Tribal Sex Offender Registration

Like the states, many tribal governments began developing sex offender monitoring and tracking programs in the 1990s to assist with the prevention of sex offenses in their communities. As noted, while the data is not currently sufficient to tie these statistics solely or even primarily to Indian reservations, rates of sexual

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<sup>27</sup> 25 U.S.C. § 3207 (2000).

<sup>28</sup> 25 U.S.C. § 3204 (2000).

<sup>29</sup> See *Indian Child Protection and Family Violence Prevention Act Amendments: Hearing on S. 1899 Before the Senate Comm. on Indian Affairs*, 109th Cong. (Mar. 15, 2006) (Q&A portion by Senator Dorgan, following Pat Ragsdale's testimony), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:26699.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:26699.wais).

<sup>30</sup> 42 U.S.C. § 14071 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, & Future*, 34 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 3, 5 (2008).

<sup>33</sup> 42 U.S.C. § 14071(e) (2006).

violence are higher among Indian women than others in America.<sup>34</sup> Moreover, Department of Justice statistics indicate that American Indian and Alaska Native women experience seven sexual assaults per one thousand per year, compared to only three such assaults per one thousand among Black Americans, two per one thousand among Caucasians, and only one per one thousand among Asian Americans.<sup>35</sup> While data is not currently sufficient to tie these statistics solely or primarily to Indian reservations, it is clear that sexual abuse of children is also alarmingly high in American Indian communities.<sup>36</sup> Moreover, some evidence suggests that gaps in criminal jurisdiction and law enforcement on tribal lands have caused sex offenders to target Indian communities.<sup>37</sup> Many tribal governments naturally responded to these alarming problems by enacting provisions containing registration and tracking features.

Tribal sex offender registration codes, like those of the states, have varied in their scope and requirements. For example, the Tohono O'odham Nation, located in southern Arizona, adopted a tribal sex offender registration code in 2000 that includes residence restrictions and provides for community notification.<sup>38</sup> Similarly, the Skokomish Tribe, which is located in Washington State, also imposes residence restrictions on registered sex offenders and provides for community notification.<sup>39</sup> The Skokomish Criminal Code, which was adopted in 1998, also requires the Tribal Director of Public Safety to assess the level of risk posed by each offender and to categorize the offender at one of three risk levels.<sup>40</sup>

Because of the limitations on tribal criminal jurisdiction over non-Indians,<sup>41</sup> tribal sex offender registration provisions generally provide different penalties for

<sup>34</sup> See TJADEN & THOENNES, *supra* note 1, at 22.

<sup>35</sup> BUREAU OF JUST. STAT., AMERICAN INDIANS AND CRIME 3 (1999), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/aic.htm>.

<sup>36</sup> See Dep't of Health and Human Services, *supra* note 4.

<sup>37</sup> MAZE OF INJUSTICE, *supra* note 3; At a 2006 SCIA Hearing, Chairman John McCain stated that "The Indian Child Protection and Family Violence Prevention Act was enacted in 1990 in response to the findings . . . that certain BIA schools had become safe havens for child abusers. The investigation of these crimes revealed that the perpetrators knew that the reporting and investigation of these heinous acts were in such a sorry state that they would rarely be detected." *Hearing before the Committee on Indian Affairs*, 109th Cong. 1 (2006).

<sup>38</sup> Ordinance of the Tohono O'odham Legislative Council, Title 7, ch. 3 (enacted May 10, 2000), *available at* <http://www.arizonanativenet.com/law/TOCode/PDFs/Title%207%20ch3.pdf> (last visited June 22, 2008).

<sup>39</sup> Skokomish Criminal Code, §§ 9.02B.005-9.02B.095, *available at* <http://www.skokomish.org/SkokConstitution&Codes/Codes/STC9-02B.htm> (last visited June 22, 2008).

<sup>40</sup> *Id.* § 9.02B.020.

<sup>41</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (stating that tribes lack criminal jurisdiction over non-Indians); *United States v. Lara*, 541 U.S. 193 (2004) (stating that tribes have jurisdiction over Indians who are not tribal-members); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established.").

Indian and non-Indian violators. Indian violators are generally subject to some period of incarceration.<sup>42</sup> In the case of non-Indian violators, the tribal codes generally provide for the exclusion of the non-Indian violator from tribal lands.<sup>43</sup> The Eastern Band of Cherokee Indians adopted a provision giving members of the tribe the right to petition for exclusion of an individual from tribal lands for failure to register.<sup>44</sup> Additionally, a number of tribal sex offender codes require tribal law enforcement officers to input sex offender registration information into the National Criminal Information Center [NCIC] database so that the information is nationally available.<sup>45</sup> A census of tribal justice agencies conducted by the Bureau of Justice Statistics in 2002 found that fifty-four tribal governments were routinely submitting information on tribal sex offenders to the National Sex Offender Registry.<sup>46</sup>

From 2002–2005, a series of high profile cases involving sex offenders who had crossed state lines to re-offend fueled a movement for increased uniformity in sex offender registration systems across jurisdictions.<sup>47</sup> Meanwhile, the constitutionality of Alaska's sex offender registration and community notification law was challenged in the United States Supreme Court. In 2003, in *Smith v. Doe*,<sup>48</sup> the Court upheld Alaska's law against a challenge under the Ex Post Facto Clause, rebuffing the claim that the law constituted retroactive punishment.

The Court's holding in *Smith v. Doe*, that sex offender registration is regulatory in nature, rather than punitive, was keenly relevant on Indian reservations. Because states generally lack regulatory authority on Indian lands, even in Public Law 280 jurisdictions,<sup>49</sup> the decision suggested that state sex offender registration schemes could not apply to Indians on Indian lands. It did not take long for this issue to reach the courts.

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<sup>42</sup> See, e.g., White Mountain Apache Tribal Code, ch. 4, §§ 4.20, 4.22 (enacted Jan. 2000), available at <http://www.wmat.nsn.us/Legal/Criminal.html#SECTION%204.22> (last visited June 22, 2008).

<sup>43</sup> See, e.g., Eastern Bank of Cherokee Indians Tribal Code, § 14-50.13 (adopted Oct. 27, 2000), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech14crimallawpt2.htm#10> (last visited June 22, 2008).

<sup>44</sup> *Id.* § 14-50.12.

<sup>45</sup> See, e.g., Tohono O'odham Nation Tribal Code, *supra* note 38.

<sup>46</sup> STEVEN PERRY, BUREAU OF JUST. STAT., CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY iii (2002).

<sup>47</sup> Susanne Nadeau, *Child Protection: Bush Signs Dru's Law - Bill Calls for Closer Monitoring of Sex Offenders, Harsher Penalties*, GRAND FORKS HERALD, July 28, 2006; Audrey McAvoy, *Walsh: Federal Bill for Slain Son Overdue*, AP WORLDSTREAM, July 27, 2006.

<sup>48</sup> *Smith v. Doe*, 538 U.S. 84 (2003) (holding that the Alaska Sex Offender Registration Act did not violate the constitutional proscription of ex post facto criminal laws because the act was civil and regulatory rather than criminally-punitive in nature).

<sup>49</sup> See *Bryan v. Itasca County*, 246 N.W.2d 560 (Minn. 1976); *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).



In *State v. Jones*,<sup>50</sup> Minnesota state courts were asked to consider the application of Minnesota's sex offender registration law to Indian lands. Jones, a member of the Leech Lake Band of Ojibwe, who resided on the reservation, was charged by state authorities with failing to comply with Minnesota's registration law.<sup>51</sup> Jones moved for dismissal on the ground that the registration law was civil in nature, rather than criminal, and therefore the state lacked jurisdiction over tribal members residing on Indian reservations. The trial court granted the motion,<sup>52</sup> and the state appealed, arguing that sex offender registration is criminal in nature and thus a state responsibility under Public Law 280.<sup>53</sup>

While Minnesota continued its efforts to prosecute Jones for failing to register, tribal leaders from many of the ten Indian reservations in Minnesota began negotiating with the State Attorney General to find a political solution that would close the gap in sex offender registration that existed on many reservations.<sup>54</sup> The tribal governments that did not have registration requirements in place enacted tribal sex offender registration codes. Many of the tribes also entered into a Memoranda of Understanding ["MOU"] with the Minnesota Attorney General that set forth the obligations of the state and each tribe. Because the circumstances of the tribes varied with respect to their location, population size, relationships with local enforcement agencies, and access to resources, the MOUs were each individually negotiated. This allowed the state and tribes to negotiate the best distribution of authorities based on the individual circumstances of each tribe rather than imposing a one-size-fits-all solution.

Meanwhile, tribes across the country began advocating for a tribal sex offender registration mechanism that would enable them to share critical public safety information. As a result, a provision was included in Title IX of the reauthorization of the Violence Against Women Act ["VAWA"], which was signed into law on January 5, 2006.<sup>55</sup> Section 905 of VAWA authorized one million dollars a year for five years to be granted to a tribe or tribal organization to help develop both a national tribal sex offender and an order of protection registry.<sup>56</sup> Consistent with the long-standing federal policy of respect for tribal self-determination,<sup>57</sup> the VAWA provision was flexible and would create a

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<sup>50</sup> *State v. Jones*, 729 N.W.2d 1 (Minn. 2007).

<sup>51</sup> Timothy J. Droske, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U. L. REV. 897, 898 (2000).

<sup>52</sup> *Jones*, 729 N.W.2d 1 (Minn. 2007).

<sup>53</sup> All of the reservations in Minnesota are subject to PL 280 jurisdiction with the exception of the Red Lake Band of Chippewa Indians.

<sup>54</sup> Droske, *supra* note 51, at 915.

<sup>55</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 905(b), 119 Stat. 2960 (2006).

<sup>56</sup> *Id.*

<sup>57</sup> In 1970 President Richard Nixon announced a new federal Indian policy of "self-determination" for Indian nations that has been reaffirmed by every subsequent President. *Message*

voluntary registry available for the use of all tribal governments.

Six months later, the Sex Offender Registration and Notification Act was enacted as part of the Adam Walsh Child Protection and Safety Act [AWA]. Indian tribes likely made the radar screen in the AWA because of the high profile issue being litigated in *State v. Jones*. It is impossible to be certain, however, because the legislative history of the AWA is virtually non-existent.<sup>58</sup> Despite having its origin in several related bills during preceding sessions,<sup>59</sup> the ultimate version moved through Congress with tremendous speed and little deliberation, passing the Senate by unanimous consent and the House by an overwhelming vote shortly after being introduced and reported out of committee.

Despite the apparent lack of deliberation, the AWA contained a sharp change in course from the perspective of tribes. While the language authorizing the national tribal registry in VAWA was broad and flexible, Congress took a very different approach in SORNA. SORNA created a complicated scheme for including Indian tribes and imposed a wide-range of requirements. Since no hearings were held exploring the unique needs of tribal communities during the consideration of SORNA, existing efforts to track sex offenders on tribal lands were not considered by Congress. Moreover, nothing in the legislative history of SORNA suggests that the drafters of the legislation were aware of the tribal sex offender registry provision included in VAWA only six months earlier.

SORNA raised issues for Indian tribal governments in two important ways. First, SORNA made it a federal offense for an individual who has been convicted of a qualifying sex offense in tribal court to fail to register in the jurisdiction where the offender works, lives, and attends school.<sup>60</sup> Second, SORNA required all jurisdictions to include tribal court convictions for qualifying sex offenses in their registries.<sup>61</sup> On its face, the recognition of tribal convictions is a positive

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*from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. Doc. No. 91-363, at 3 (1970).

<sup>58</sup> See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008).

<sup>59</sup> See, e.g., Children's Safety Act of 2005, H.R. 3132, 109th Cong. (2005) (introduced on June 30, 2005, by House Judiciary Committee Chairman James Sensenbrenner). See also H.R. 3133, The Sex Offender Registration and Notification Act (introduced on June 30, 2005, by Rep. Mark Foley). Rep. Mark Foley also introduced House Bill 4905, on March 8, 2006, which was a slightly different version of the Sex Offender Registration and Notification Act, and which ultimately was adopted as § 127 of the Adam Walsh Act. Foley resigned later in the year on charges that he had inappropriate relationships with Congressional pages. See Jeff Zeleny, *House's Program for Teenagers is No Stranger to Scandal*, N.Y. TIMES, October 1, 2006, § 1, at 26.

<sup>60</sup> 18 U.S.C. § 2250 (2000). The Department of Justice has issued Guidelines instructing that this registration requirement has retroactive application. DOJ Final Guidelines to implement SORNA, 73 Fed. Reg. 38,030-38,070 (July 2, 2008).

<sup>61</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111(6), 120 Stat. 587 (2006). The Adam Walsh Act also included an amendment to the Major Crimes Act that has significant implications for tribal communities that is not discussed in this article. Section 215 of

normative development from the perspective of tribal courts. It extends a legitimacy to tribal convictions that is otherwise typically lacking under federal law.<sup>62</sup> However, the lack of uniformity is, itself, somewhat troubling. In elevating tribal sex offense convictions above other tribal convictions and tribal civil judgments, the United States could be accused of being selective and capricious.<sup>63</sup> Thus, using tribal convictions in this manner may say more about the general congressional antipathy toward sex offenders than congressional respect for tribal court judgments.

Once SORNA was enacted, the result in the Minnesota case, *State v. Jones*, became irrelevant, at least as a policy matter.<sup>64</sup> While the litigation had called attention to what many observers considered to be a gap in the nation's ability to track sex offenders and likely spawned congressional attention to the matter in SORNA, the law's enactment implicitly conceded the defendant's argument in *State v. Jones* and, in any event, SORNA now occupied the field, imposing a clear federal mandate of registration. In addition to SORNA, through the cooperation among tribes and states, no fewer than four separate mechanisms for tracking sex offenders on tribal lands had been established to ensure that Indian reservations would not become "safe haven[s] for sex offenders."<sup>65</sup>

#### IV. TRIBES AS SORNA REGISTRATION JURISDICTIONS

In addition to recognizing tribal court convictions, section 127 of SORNA attempts to track the existing jurisdictional framework on Indian lands, but does so in a way that grossly oversimplifies the complex distribution of authorities. SORNA creates two classes of tribes: (1) those subject to Public Law 280 jurisdiction in the six mandatory Public Law 280 states (Minnesota, Wisconsin,

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the Adam Walsh Act added "felony child abuse and neglect" to the list of crimes enumerated in the Major Crimes Act, 18 U.S.C. § 1153, over which the federal government has jurisdiction.

<sup>62</sup> See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403 (2004) (disagreeing with the U.S. Sentencing Commission's general refusal to accord respect to tribal court convictions and sentences in criminal history calculations).

<sup>63</sup> See Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263 (2004) (noting that state and federal courts seem more willing to respect tribal court criminal judgments than civil judgments and arguing that this is difficult to square with traditional notions of due process, which suggest that criminal defendants are entitled to greater scrutiny of governmental procedure than civil defendants).

<sup>64</sup> The case was ultimately decided by a 3-2-2 vote with no majority opinion. See *Jones*, 729 N.W. 2d 1 (Minn. 2007). Only the concurrence and dissent explicitly considered federal Indian law principles. Strikingly, none of the opinions cited the U.S. Supreme Court's recent ruling in *Smith v. Doe*, 538 U.S. 84 (2003), which clearly asserted that sex offender statutes are regulatory rather than criminal in nature.

<sup>65</sup> Rachel E. Stassen-Berger, *Tribes Say They'll Track Sex Offenders, Leaders Working With State Officials*, ST. PAUL PIONEER PRESS, Aug. 2, 2005, at B3.

Nebraska, Oregon, California, and Alaska) and (2) all other tribes.<sup>66</sup> For tribes in the first category, authority and responsibility to implement the SORNA on Indian lands was automatically delegated to the state in which the tribal lands are located. Tribes in the second category, which included those tribes subject to PL 280 jurisdiction in the voluntary PL 280 states, were given one year to pass a resolution “elect[ing] to carry out [SORNA] as a jurisdiction subject to its provisions.”<sup>67</sup> Those tribes that failed to enact a resolution before the deadline joined the mandatory PL 280 tribes in the first category, and all responsibility to implement the SORNA requirements on tribal lands was delegated to the state.<sup>68</sup>

Of the 562 federally-recognized Indian tribes in the United States, 211 were eligible to make an election under section 127 of SORNA. The Department of Justice has reported that 198 of the eligible tribes passed a resolution expressing their intention to comply with the SORNA mandates.<sup>69</sup> An additional five tribes passed resolutions delegating their responsibilities under the Act to the states in which the tribes’ lands are located.<sup>70</sup> A number of Indian tribes in mandatory PL280 jurisdictions, while expressly excluded from making an election under Section 127, passed resolutions stating their intention to comply with the law and expressing their opposition to the delegation of their authority to the state.<sup>71</sup> Although section 127 included a stringent deadline for tribes to elect to comply with the SORNA mandates, the law also acknowledged that any tribe that has made a section 127 election may change its mind at any time and the responsibility for implementing SORNA on tribal lands will immediately fall to the state.<sup>72</sup>

SORNA imposes a host of new requirements on participating jurisdictions.<sup>73</sup> The Act requires that each jurisdiction use a public website registry, conform its criminal code to a 3-tiered system for classifying sex offenders, adjust its registration laws to the registration periods set forth in SORNA, register specified juvenile offenders, and conduct periodic in-person verification of an offender’s registration information. In addition, SORNA imposes intrusive requirements regarding personal data that must be included in a jurisdiction’s registry. A sex offender must comply with registration requirements in any jurisdiction where he was convicted, works, resides, goes to school, or visits for seven days. Required

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<sup>66</sup> Adam Walsh Child Protection and Safety Act § 127.

<sup>67</sup> *Id.* § 127(a)(1)(A).

<sup>68</sup> *Id.* § 127(a)(2)(B).

<sup>69</sup> Leslie Hagen, SMART Office, Dep’t of Justice, at the National Tribal Symposium on Sex Offender Management and Accountability (Mar. 6, 2008).

<sup>70</sup> *Id.*

<sup>71</sup> See OFFICE OF JUSTICE PROGRAMS, TRIBAL RESOLUTIONS PURSUANT TO THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, available at [http://www.ojp.usdoj.gov/smart/pdfs/tribal\\_govt\\_elections.pdf](http://www.ojp.usdoj.gov/smart/pdfs/tribal_govt_elections.pdf) (last visited Nov. 16, 2008).

<sup>72</sup> Adam Walsh Child Protection and Safety Act § 127(a)(2)(B).

<sup>73</sup> Some commentators have suggested that these new requirements raise substantial federalism concerns. See, e.g., Logan, *supra* note 32.

registration information includes: name, social security number, a photograph, DNA sample, palm and finger prints, a list of identifying features, home address, place of employment, conviction information, driver's license number, information about vehicles to which he has access, email addresses, and any other information the U.S. Attorney General may require.<sup>74</sup>

Depending on the class of crime committed, the sex offender will be responsible for verifying and updating all of his or her registration information quarterly, biannually, or annually for a minimum of fifteen years for the least serious offenders, and for life for the most serious offenders.<sup>75</sup> Participating jurisdictions must conform their registration and notification laws to the federal standards before July 27, 2009. Failure to meet the deadline for compliance will result in a loss of ten percent of allocated federal law enforcement funding.<sup>76</sup> For tribes that fail to meet the deadline, responsibility and authority under the Act will be delegated to the state.<sup>77</sup>

In sum, SORNA has resulted in a massive transfer of tribal authority to states, without consulting tribes in any significant way. Moreover, tribes retaining authority to monitor sex offenders on their lands have seen their flexibility to tailor registration and notification systems to their communities' needs severely diminished.

## V. CONCERNS ABOUT THE IMPLEMENTATION OF SORNA ON INDIAN LANDS

### A. Fragmentation of Jurisdictional Authority

SORNA threw a monkey wrench into the jurisdictional scheme on Indian reservations. Through inadvertence and ignorance of the complex jurisdictional issues at play, Congress created state regulatory authority that had not previously existed on some Public Law 280 reservations and arguably created state criminal authority where it did not previously exist in non-PL 280 jurisdictions. For tribes in the latter category, SORNA constitutes the only delegation of authority to states on reservations, dramatically undermining longstanding federal legal principles providing that Indians on reservations are subject to tribal or federal authority, but never state authority.<sup>78</sup> It also undermines the baseline principle that only the federal and tribal governments can bring criminal actions against Indians for on-reservation criminal activity.<sup>79</sup>

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<sup>74</sup> Adam Walsh Child Protection and Safety Act § 114.

<sup>75</sup> *Id.* § 115.

<sup>76</sup> *Id.* § 125(a).

<sup>77</sup> *Id.* § 127 (a)(2)(C).

<sup>78</sup> *See Williams v. Lee*, 358 U.S. 217 (1959).

<sup>79</sup> *Cf. Nevada v. Hicks*, 533 U.S. 353 (2001) (articulating the principle, never articulated previously, that state law enforcement officials have authority to enter an Indian reservation to

In addition, as a result of SORNA, regulatory authority in some PL 280 jurisdictions is now divided among two different sovereigns—state and tribal—instead of just one (tribal). Still worse, on Indian Country reservations not subject to state jurisdiction under PL 280, criminal authority will now potentially be divided not just between two but between three different sovereigns, dramatically increasing the coordination problems that inevitably occur when jurisdictional authority is fragmented. Adding to the confusion, section 127 creates a system where tribes are situated differently as a matter of law within a state or between states, depending on their status under PL 280 and their election under section 127 of SORNA. Moreover, for some tribes who have reservation lands extending across state borders, the treatment may cause even more confusion, which is a problem for the handful of tribes that have lands in both PL 280 and non-PL 280 states. The Fort Mojave and Quechan tribes, for example, both have lands that straddle the border of California, which is a mandatory PL 280 jurisdiction, and Arizona, which is not. According to the Department of Justice both tribes passed resolutions expressing their intent to comply with the mandates in SORNA.

Numerous studies have concluded that the complexity of the jurisdictional rules on Indian reservations creates significant impediments to effective law enforcement.<sup>80</sup> Each criminal investigation involves a cumbersome procedure to establish who has jurisdiction over the case according to the nature of the offense committed, the identity of the offender, the identity of the victim, and the legal status of the land where the crime took place. The first law enforcement officials called to the scene are often tribal police or BIA officers, and these officers may initiate investigations and/or detain a suspect. Then a decision has to be made whether the crime is of the type warranting involvement by the FBI or state law enforcement. The officers then decide whether to refer the case to the tribal prosecutor, the U.S. Attorney's office, or the local district attorney. SORNA complicates this regime by, in essence, cherry-picking one particular type of offense and treating it differently than all the others.

### *B. Destabilization of Existing Law Enforcement Regimes*

Effective law enforcement on Indian reservations requires a high degree of coordination among sovereigns.<sup>81</sup> Such coordination has proven very difficult to establish and maintain. In some areas cooperative agreements and memoranda of

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investigate a crime involving an Indian only if they are investigating crimes that occurred outside the reservation).

<sup>80</sup> See, e.g., MAZE OF INJUSTICE, *supra* note 3.

<sup>81</sup> See Kevin K. Washburn, *Testimony on Law Enforcement in Indian Country before the United States Senate Committee on Indian Affairs, 110th Congress, 1st Session* (2007), available at <http://ssrn.com/abstract=1030908> (generally explaining the importance of cooperation between tribal governments and their state and local counterparts in police work in Indian Country).

understanding have been negotiated among state, tribal, and federal governments to facilitate this coordination. These agreements vary greatly in their details, but are grounded in the shared recognition that tribes, states, and counties can enhance their law enforcement efforts by working collaboratively.<sup>82</sup> Nearly all tribal justice agencies have at least one cross-deputization agreement in place with another jurisdiction.<sup>83</sup> Many of these agreements provide for the deputization of tribal police officers who meet certain minimum qualification and training requirements as state or county officers, so that tribal police can enforce state criminal law on Indian reservations. These agreements may also address data-sharing issues, the execution of search and arrest warrants on Indian reservations, and establish policies for "hot pursuit."<sup>84</sup> Unfortunately, historic hostilities and mistrust between tribes and the states persist in some areas, and this type of negotiated coordination has not been possible.

Most of these agreements are attempts to work around structural and jurisdictional problems that no rational planner would voluntarily create. Yet, through inadvertence, Congress has created, in SORNA, yet another obstacle for which tribes will need to enter into still more jurisdictional agreements to make workable.

SORNA has the potential to destabilize many of these carefully negotiated agreements by redistributing civil and criminal authority for managing sex offenders. Because the law establishes a different distribution of authority for registration violation crimes, officers may find themselves in a situation in which they do not have access to state registry information or lack the authority to enforce state law if the situation involves an offender who has violated the state registration laws. As a practical matter, law enforcement officers are likely to be confused by the new approach to jurisdiction for sex offender registration on tribal lands. In many places, state authorities will have this authority for the first time, and a long period of adjustment can be expected.

Section 127 of SORNA ignores the coordination that is necessary between state, local, and tribal authorities and instead treats tribes and states as interchangeable for purposes of implementation of the law. This approach ignores the pivotal role the tribal government should play in ensuring the successful implementation of the national sex offender registration system on their lands. Consider, for example, the tribal responsibilities inherent in such a scheme: First, even where a state has full authority under SORNA on tribal lands, the state will depend on the tribal courts to notify offenders of their registration obligation.

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<sup>82</sup> *Id.*

<sup>83</sup> According to the Bureau of Justice Statistics, ninety-nine percent of tribes participating in the census reported cross-deputization agreements with other agencies. STEVEN PERRY, *supra* note 46.

<sup>84</sup> See National Congress of American Indians, *available at* [http://www.ncai.org/Law\\_Enforcement\\_Agreements.100.0.html](http://www.ncai.org/Law_Enforcement_Agreements.100.0.html) (last visited Sept. 17, 2008) (collecting law enforcement agreements between tribes and neighboring jurisdictions).

Second, the tribal detention facilities will be housing offenders that must be entered into the state registry. Third, the state will need access to tribal registries, many of which are not electronic. Most importantly, the tribal or BIA law enforcement officers will be the officers most likely in need of information on registrants for investigation purposes and best positioned to assist registration personnel with tracking down non-compliant registrants. The state likely will not have an infrastructure in place on tribal lands to register and track sex offenders. Since meeting these responsibilities is costly and requires cooperation between those with formal authority (the state) and those with actual information (the tribe), registration could easily fall between the cracks, with the tribe indicating that the state is responsible and the state blaming the tribe for any lack of cooperation.

The creation of the seamless nationwide sex offender registration and tracking system envisioned by SORNA will require states, tribes, and the federal government to work together to negotiate a number of issues including: the details of the process for initial registration, digitization of information required to be collected including tribal codes, procedures for verification of registration information on Indian reservations, and how information will be shared across state, tribal, and federal jurisdictions. A high degree of coordination will be required between state and tribal officials if tribal offenders are to be included in the state system. In many places, this coordination does not currently exist, and information-sharing between states and tribes has been a controversial issue.

### *C. Intrusion on Tribal Sovereignty*

In sum, SORNA significantly intrudes on tribal sovereignty and self-government and does so in an era when Congress has increasingly realized the importance of recognizing a key role for tribes in implementation of federal programs on Indian reservations. The intrusion is difficult to square normatively with current federal Indian law and policy.

It likely was not intended to be such an intrusion. It was an inadvertent outcome made in a rush to take action.<sup>85</sup> Congressional committees failed to focus closely on the tribal impacts of the Adam Walsh language. Indeed, the only testimony on the effects of the bill on tribes was not related to SORNA, but on the new punishments for federal sex offenses.<sup>86</sup> Congressional ignorance and the

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<sup>85</sup> Another scholar has noted that Congress failed to consider empirical data that might bear on the effectiveness of the statute. See Logan, *supra* note 32, at 15 ("One of the most striking features of the nation's modern rush to embrace registration and notification is the utter disregard of empiricism.").

<sup>86</sup> *Protection Against Sexual Exploitation of Children Act of 2005 and Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing on H.R. 2318 and H.R. 2388 Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. On the Judiciary*, 109th Cong. 38-39 (2005) (statement of John Rhodes, Assistant Federal Defender, District of Montana).



inability of tribes to be heard in congressional hearings cost tribes dearly.<sup>87</sup> It will also necessarily have an impact on the effectiveness of SORNA. In most places in which states have new-found jurisdiction under SORNA, they will have great difficulty meeting their obligations without substantial tribal assistance. A more effective regime would recognize tribes, rather than states, as the default authority for sex offender registration.

## VI. OTHER PROBLEMS ON THE HORIZON

While SORNA creates an unworkable and likely ineffective jurisdictional structure and adds additional complexity to an already very complicated regime, it faces several other practical problems as well.

### A. SORNA and Federal Law Enforcement and Corrections

One complexity left unaddressed in SORNA is the role that the Bureau of Indian Affairs (BIA or Bureau) will play in registering and tracking sex offenders. Many tribes rely on the BIA to provide law enforcement, judicial, and detention services on tribal lands.<sup>88</sup> The BIA funds fifty-nine detention facilities on tribal lands and directly operates twenty.<sup>89</sup> Forty-seven tribal law enforcement programs are BIA-operated, and an additional 154 programs are BIA-funded.<sup>90</sup> Forty-six tribal communities are served by BIA-operated courts.<sup>91</sup> Neither SORNA nor the implementation guidelines proposed by the Department of Justice address what, if any, role the BIA will play in sex offender management on tribal lands and how offenders convicted in BIA-run courts or housed in BIA detention facilities will be registered.

SORNA mandates that “an appropriate official shall, shortly before the release of the sex offender from custody, or if the sex offender is not in custody, immediately after the sentencing of the sex offender . . . ensure that the sex offender is registered.”<sup>92</sup> However, under the Proposed Guidelines released by the Department of Justice in May 2007,<sup>93</sup> federal courts and correction facilities will

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<sup>87</sup> See Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 793–96 (2006) (arguing that tribes are sometimes subject to the whims of national policy and urging tribes to board the rapidly moving “freight trains that move federal policy” or risk being struck by them).

<sup>88</sup> PERRY, *supra* note 46.

<sup>89</sup> Guillermo Rivera, Bureau of Indian Affairs, Testimony before the National Prison Rape Elimination Commission, Mar. 26, 2007.

<sup>90</sup> PERRY, *supra* note 46.

<sup>91</sup> *Id.*

<sup>92</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 117(a)(3), 120 Stat. 587 (2006).

<sup>93</sup> The National Guidelines for Sex Offender Registration and Notification—Proposed Guidelines, 72 Fed. Reg. 103 (May 30, 2007).

not be obliged to comply with this provision. Rather, federal corrections officials will merely provide federal sex offenders with notice that the individual must register within three days in the appropriate state or tribal jurisdictions.<sup>94</sup>

Today, over sixty percent of federal sex offense cases occur in Indian Country,<sup>95</sup> and the majority of such offenders will return to Indian reservations. If the Department of Justice adheres to the view that federal prisons are exempt from the requirement to register offenders prior to release, this would disproportionately burden Indian communities. If the need for national uniformity is one of the primary justifications for SORNA, it makes little sense to exempt federal prisons.

### *B. Tribal Resources for Implementation*

Perhaps the biggest challenge facing tribal communities attempting to implement SORNA is the cost. Because of a desire to preserve tribal authority vis-à-vis the states, many tribes have opted-in as registration jurisdictions under section 127 even though they likely will not have the capacity to meet the onerous requirements set out in SORNA without a substantial expenditure of resources. An unfunded mandate is troubling enough for a state, but most states have a significant income or property tax base. Since American Indian communities are among the poorest in the United States, few tribal governments impose income taxes on tribal members. Since tribal land is often held in trust by the federal government, tribal governments lack the authority to impose an effective property tax regime. Thus, tribes lack significant tax bases that could fund implementation. If sex crimes rates tend to follow poverty rates, then the greatest burden may well fall on the poorest tribes.

Tribes also face substantial technological and infrastructure issues. The states and territories have had more than ten years to build the sex offender management systems that will be modified and updated to comply with SORNA. Many tribes, however, are starting from scratch, and it will be extremely costly for Indian tribes to build the infrastructure necessary to comply with the law's mandates. To date, no money has been made available from the Department of Justice to assist tribes in complying with the law.<sup>96</sup> In addition, appropriations for implementing the law were cut in FY 2008 from more than \$20 million to just over \$4 million, making it

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<sup>94</sup> *Id.* at pt. IX.

<sup>95</sup> LAWRENCE PIERSOL ET AL., REPORT OF THE NATIVE AMERICAN ADVISORY GROUP (2003), available at <http://www.ussc.gov/NAAG/NativeAmer.pdf> (Larry Piersol is the federal judge who was the Chairman of the Advisory Group).

<sup>96</sup> The SMART office released a grant solicitation for Adam Walsh Act implementation in Indian Country in the fall of 2007. In the spring of 2008, it announced awards of \$11.8 million to state and tribal governments, approximately \$2 million of which was designated for individual Indian tribes. United States Dep't of Justice, *DOJ Announces \$11.8 Million to Help State and Tribal Governments Comply with Adam Walsh Act*, PRESS RELEASE, (Apr. 28, 2008). The SMART office is expected to announce a second round of grants in September 2008, some of which will also be awarded to Indian tribes.

increasingly unlikely that significant funding will be made available prior to the 2009 compliance deadline. Moreover, unlike the states, federal law limits the ability of tribes to raise governmental revenue through the levy of taxes in significant ways that will make it difficult for tribes to offset the financial burdens arising from the statute.<sup>97</sup> As a result, many tribal governments may be forced to divert limited tribal public safety resources away from other priorities.<sup>98</sup> Or, more likely, they will be compelled to opt-in and submit their sovereign authority to states.

For some tribes, the “digital divide” long prevented tribes from even considering the possibility of being part of the system that SORNA envisions.<sup>99</sup> While the digital divide has decreased with improvements in inexpensive communications technology, compliance with SORNA will require tribes to have access to the National Sex Offender Registry (NSOR) maintained by the FBI and other federal criminal information databases. Currently, Indian tribes can access the federal databases only by going through the state in which the tribe is located. Some tribes have been able to negotiate agreements with state governments to gain this access. These agreements vary between states, with some states charging substantial sums or requiring criminal information sharing before granting access to the tribes. Many tribes have been unable to negotiate an agreement with the state. As a result, they effectively are shut out of the federal criminal databases. Indian tribes have been advocating for direct access to the federal database for years, and a provision was included in VAWA stating that the “Attorney General shall permit Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into Federal criminal information databases and to obtain information from the databases.” However, the FBI continues to assert that tribes can only access the databases by negotiating with the state.<sup>100</sup>

A census of tribal justice agencies conducted by the Bureau of Justice Statistics in 2002 found that fifty-four tribes were submitting information on tribal sex offenders to the National Sex Offender Registry.<sup>101</sup> However, less than twelve percent of tribes were electronically connected to jurisdictions off the reservation; nearly half of tribal justice agencies reported that they do not have access to the

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<sup>97</sup> See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding that tribe lacked authority to impose hotel occupancy tax on nonmembers on fee land within the reservation even though the tribe provided fire protection and other governmental services).

<sup>98</sup> The profound resource need for Indian Country justice systems has been well documented. United States Department of the Interior, Bureau of Indian Affairs, Office of Law Enforcement Services, Gap Analysis Data (2006) (on file with author).

<sup>99</sup> Therese Bissell, Note, *The Digital Divide Dilemma: Preserving Native American Culture While Increasing Access to Information Technology on Reservations*, 2004 U. ILL. J.L. TECH. & POL'Y 129 (2004).

<sup>100</sup> Federal Bureau of Investigation, Comments at the “Government-to-Government Consultation on Violent Crime in Indian Country” (March 5, 2008).

<sup>101</sup> PERRY, *supra* note 46.

National Criminal Information Center database, and only fourteen tribes reported that they were routinely sharing crime statistics with the state or local governments or the FBI.<sup>102</sup> In addition, the vast majority of tribal law enforcement agencies are still using ink and paper fingerprinting techniques that will have to be upgraded to LiveScan technology before tribes can comply with SORNA.

## VII. CONCLUSION

The legislative atmosphere around sex offender management regimes has rarely been deliberative. The political pressure to avoid looking soft on sex offenders has created a legislative rush to enact ever more stringent sex registration laws. For the most part, the dysfunctional process has redounded to the disadvantage of the offenders themselves. Since they are perhaps the least sympathetic figures in the entire criminal justice system, the public is not overly concerned if the laws have a harsh edge. However, the process used in this particular law may have other serious ramifications. While many would suggest that the rushed efforts to enact SORNA are justified because of the magnitude of the problem, SORNA shows that the non-deliberative process used may have a significant negative impact on victims and tribes.

First, it should be obvious that an under-theorized legislative initiative that fails to anticipate real world problems is less likely to be successful. If Congress is concerned about preventing sex offenses and preventing future victimization, then it ought to work harder to create a workable system. In its haste to show resolve on an important issue of public policy, Congress has failed to work through the difficult questions of how to build an effective system. Offenders will fall through the large practical gaps created in the SORNA regime. Since a registration system is at least partially designed as a means to help prevent future offenses, we can anticipate that an ineffective regime will manifest in fewer sex offenses prevented. The sex offender who falls through the cracks may claim more victims. In other words, congressional haste may have a tragic consequence: a greater number of sex offenses that might have been prevented.

The second significant drawback is related but concerns a different constituency. SORNA has undermined tribal sovereignty and self-government. While tribal sovereignty and self-government are compelling normative principles standing alone, the United States has also come to recognize that their value has enormous practical, not just symbolic, importance. Federal respect for tribal sovereignty and self-governance simply represents good government.

Federal Indian policy in the last thirty-five years has been premised largely on the notion that tribes are the best primary providers of services to Indian people. While all governmental services are better handled by officials who are accountable to the communities they serve, law enforcement in particular is an

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<sup>102</sup> *Id.*

“insider’s game.”<sup>103</sup> As the community policing movement has demonstrated, law enforcement works far better when law enforcement is embedded in the fabric of communities. SORNA runs counter to these widely respected principles. Under the SORNA regime, the officials charged with enforcement will very often be outsiders, state officials who are less invested in and less sophisticated about tribal communities.

SORNA ought to be revisited. Because it would have been tailored to the unique problems of Indian reservations and allowed each tribe to develop a system that works best given its unique circumstances, the National Tribal Registry authorized by VAWA might have been a much better model for tribal participation in sex offense registries. If Congress is interested in preventing Indian reservations from becoming gaps in an otherwise seamless nationwide sex offender registration system, then it must look beyond mere form to actual practice. The system created by SORNA is formally seamless, but practically useless.

A far more effective approach, and one that would also begin to address other problems with public safety and law enforcement, would be to create real incentives for tribal and state law enforcement agents to work together.<sup>104</sup> Though the work was largely made irrelevant in light of SORNA and the outcome in *State v. Jones*, the Minnesota example shows that tribes and states can work well together to address the serious problem that sex offenses pose to tribal communities. Initiatives developed organically at the local level can be adjusted to fit the needs of diverse tribal communities and are far more likely to produce actual compliance and effective management than a formal and uniform top-down mandate from federal officials. SORNA should be reconsidered with the practical realities of Indian reservations in mind.

The tragic irony in congressional implementation of sex offender registration on Indian reservations through SORNA is that the dysfunctional outcomes are likely to be most apparent on Indian reservations. Tribal victims of sex crimes are likely to suffer most. Given that the magnitude of sex offenses in Indian communities may be greater on a per capita basis than in other communities in the United States and that it was sex offenses in tribal communities that first brought sex offender registration to congressional attention, tribal interests ought to be considered in devising an effective program. Difficult issues such as sex offender management should be met with real deliberation and real financial appropriations.

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<sup>103</sup> Cf. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 86 N.Y.U. L. REV. 911, 911 (2006) (noting that criminal justice systems are run by insiders who have access to much greater information than outsiders and inevitably hold information tightly to maintain control).

<sup>104</sup> See Washburn, *supra* note 80 (generally explaining the importance of greater cooperation between tribal governments and their state and local counterparts in police work in Indian country).

